




The following constitutes the order of the Court.  
Signed: March 28, 2019

  
William J. Lafferty, III  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

In re	)	Lead Case No. 18-42169 WJL
	)	Chapter 7
Geralynne Marie Longmire,	)	
	)	Adversary Proceeding No. 18-04110
Debtor.	)	
<hr/>		<b><u>HEARING HELD</u></b>
	)	
Judd Kessler,	)	Date: February 20, 2019
	)	Time: 10:30 a.m.
	)	Dept. 220
Plaintiff,	)	
	)	
v.	)	
	)	
Geralynne M. Longmire,	)	
	)	
Defendant.	)	
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**MEMORANDUM DECISION RE MOTIONS FOR SUMMARY JUDGMENT**

These matters came for hearing on February 20, 2019, on Judd Kessler's Motion for Summary Judgment (the "Plaintiff's MSJ") on portions of Plaintiff's First Amended Complaint, and Geralynne Longmire's Counter Motion for Summary Judgment (the "Defendant's Cross-Motion"). Alexander Kessler appeared for Plaintiff Judd Kessler ("Plaintiff"); Hugo Torbet appeared for Defendant Geralynne

1 Longmire ("Defendant").<sup>1</sup> At the conclusion of oral argument the  
2 Court took the matters under submission.

3 For the reasons set forth below, the Court denies the  
4 Plaintiff's MSJ, concluding that (a) with respect to the First  
5 Claim, relating to Defendant's alleged statements concerning  
6 whether the real property which is the subject of this dispute was  
7 her residence, Plaintiff has not demonstrated that there is no  
8 genuine dispute concerning material facts related to Defendant's  
9 intent to defraud Plaintiff, (b) with respect to the Third Claim,  
10 which relates to Defendant's alleged statements concerning her  
11 monthly compensation, Plaintiff has not demonstrated that there is  
12 no genuine dispute concerning material facts related to his  
13 reasonable reliance on those statements, and (c) with respect to  
14 Plaintiff's Fourth Claim, for the reasons stated on the record  
15 during the February 20 hearing, the Court will grant the  
16 Defendant's Motion to Dismiss that claim without leave to amend,  
17 thereby rendering the Plaintiff's MSJ moot with respect to that  
18 claim. Because there exist genuine issues of material fact as to  
19 many aspects of Plaintiff's claims, and because the parties have  
20 had little time to conduct discovery in this matter, no part of  
21 this Memorandum constitutes the Court's permanent findings of fact.

22 In addition to this disposition of Plaintiff's MSJ and  
23 Defendant's Cross-Motion, as also explained more fully below, the  
24 \_\_\_\_\_

25 <sup>1</sup>In addition to the Plaintiff's MSJ and the Defendant's Cross-  
26 Motion, the Court also heard argument on Defendant's Motion to  
27 Dismiss First Amended Complaint (the "Defendant's MTD"). The Court  
28 indicated that, apart from the disposition of the Fourth Claim, it  
was disinclined to grant Defendant's MTD. The Court will dispose  
of the Defendant's MTD by separate order to be entered concurrently  
with this memorandum.

1 Court wishes to express concerns about an issue that, while neither  
2 comprehensively briefed nor fully argued by the parties, appears to  
3 be of central importance to this dispute, which is the appropriate  
4 measure of damages for the fraud alleged by Plaintiff. It does  
5 appear that Plaintiff is seeking damages based upon a "benefit of  
6 the bargain" theory, which includes, inter alia, interest accruing  
7 under a promissory note at a default rate of 21.80%, while  
8 Defendant urges that the measure of damages for a fraud claim  
9 arising under Cal. Civ. Code § 3343 would be measured by  
10 Plaintiff's "out of pocket" damages, thus potentially drastically  
11 reducing the amount of damages recoverable by Plaintiff. The Court  
12 is uncertain whether these transactions would fall within the ambit  
13 of Cal. Civ. Code § 3343; the Court is also unaware what the  
14 parties would otherwise contend would be the appropriate measure of  
15 damages under California law for alleged fraud. Accordingly, the  
16 Court will require both parties to be prepared to discuss the  
17 applicable measure of damages and to propose a means to resolve the  
18 issue at a status conference to be set by the Order accompanying  
19 this Memorandum.

#### 20 21 **BACKGROUND**

22 The following facts appear to be undisputed.

23 In the spring of 2016, Defendant needed to refinance her home  
24 at 215 El Pinto, Danville, California (the "Property") - a "hard  
25 money" loan that Defendant had secured via a lien against the  
26 Property was coming due, and Defendant did not have the funds to  
27 pay it. Defendant was self-employed, running her own sports  
28 marketing company, and while she had a demonstrated ability to earn

1 a high level of compensation, the amount of that compensation was  
2 not necessarily consistent on a month-to-month basis.

3 With the assistance of a loan broker, Russell Roesner,  
4 Defendant applied for a loan from Plaintiff as Trustee of Ingodwe  
5 Trust. This loan would also be fairly characterized as "hard  
6 money": it was a short term (all due in six months), high interest  
7 (10.90% per annum pre-default, 21.80% per annum post-default) loan,  
8 and it was to be secured by a first-priority lien against the  
9 Property. Plaintiff asserts, and Defendant does not generally  
10 contest, that as a non-institutional hard-money lender during the  
11 mid-2010's, he was able to dictate the terms and conditions of the  
12 loans he was willing to make. In other words, under the then  
13 prevailing market conditions, he essentially had his pick of  
14 lending opportunities, and he imposed certain pre-conditions to any  
15 loan: (a) he did not wish to make loans secured by his borrower's  
16 residence (based on the protections afforded to homeowner borrowers  
17 under California law, as well as the more emotionally fraught  
18 circumstances, and therefore additional delay and expense, that he  
19 believed would accompany a foreclosure of a borrower's residence);  
20 (b) he wished to make loans only to borrowers with a demonstrable  
21 ability timely and regularly to pay the monthly obligations due  
22 under the high interest rate and short term loans he would make;  
23 and (c) he wished to make only loans that would be secured by real  
24 property with a loan to value ratio of at least 80%. Plaintiff and  
25 Defendant do not appear to agree, however, on the manner and timing  
26 of Defendant's awareness of these conditions to Plaintiff's  
27 lending, or to the ultimate importance of each of these pre-  
28 conditions.

1       The parties disagree about some of the aspects of the loan  
2 application process and, for economy, the facts surrounding those  
3 disagreements will be set forth with particularity in connection  
4 with the discussion of the two remaining claims on which Plaintiff  
5 seeks summary judgment, i.e., Defendant's alleged misstatements  
6 about her residence and her income. However, the parties also seem  
7 not to disagree about the remaining portions of the narrative, as  
8 set forth below.

9       Plaintiff agreed to provide a loan to Defendant and the loan  
10 closed on or about March 11, 2016. The loan was in the original  
11 principal amount of \$1,850,000, was all due and payable on October  
12 1, 2016, and called for monthly payments in the amount of  
13 \$16,804.17 at an initial annual interest rate of 10.90%. Around  
14 the time the loan funded, Defendant changed her home address to 110  
15 Kingswood Circle, Danville, California (the "Kingswood Address").  
16 However, after approximately two months without achieving a sale,  
17 Defendant changed her home address back to the Property, having  
18 never made a payment to Plaintiff pursuant to the note. Plaintiff  
19 later learned of Defendant's living in the Property as her  
20 residence and, in any event, the parties appear to have worked co-  
21 operatively to attempt to sell the Property on favorable terms,  
22 pursuant to which Plaintiff appears to have consented for a time to  
23 Defendant's occupancy of the Property as her residence.  
24 Eventually, Plaintiff acquired the Property via foreclosure in  
25 February 2017, via a partial credit bid of \$1,500,000, and, after  
26 evicting Defendant from the Property, sold the Property in his own  
27 right on February 28, 2018 for \$1,810,000, leaving an amount unpaid  
28

1 under the note, including default interest, of \$1,146,080.57 as of  
2 December 3, 2018, around the time of filing Plaintiff's MSJ.

3 Plaintiff commenced an action in state court in October 2017  
4 for fraud related to the inducement of the loan. Defendant filed a  
5 counter-claim for seven causes of action including breach of  
6 contract. Plaintiff filed an anti-SLAPP motion in response to the  
7 breach of contract claim which was ultimately granted along with  
8 attorney's fees and costs in the amount of \$8075.72 plus 10%  
9 interest.<sup>2</sup> Plaintiff moved for summary judgment on his state law  
10 claims on August 1, 2018 and a hearing was set for November 5,  
11 2018. Defendant filed this chapter 7 bankruptcy case on September  
12 18, 2018.

13 Plaintiff commenced this adversary proceeding on November 13,  
14 2018, seeking, inter alia, a determination that the remaining  
15 unpaid obligations under the promissory note, including accumulated  
16 unpaid interest at the default rate, are non-dischargeable. More  
17 specifically, those claims are: 1) False representations regarding  
18 place of residence; 2) False representations regarding the value of  
19 the Property; 3) False representations regarding defendant's  
20 income; 4) Loan fraud; and 5) Anti-SLAPP Fee Award. Here, the  
21 Court is deciding Plaintiff's MSJ on the First, Third, and Fourth  
22 Claims, as well as Defendant's Cross-Motion on all five claims,

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23  
24  
25 <sup>2</sup>The grant of the anti-SLAPP motion forms the basis for Plaintiff's  
26 Fifth Claim, seeking a determination that Defendant's assertion of  
27 the allegedly meritless counter claim constituted an intentional  
28 injury to Plaintiff's person or property, rendering such claim non-  
dischargeable under 11 U.S.C. § 523(a)(6). Plaintiff does not seek  
summary judgment on that claim.

1 although the Fourth Claim was dismissed without leave to amend at  
2 the hearing on February 20, 2019.

### 4 ANALYSIS

#### 5 I. The Standard for Granting a Motion for Summary Judgment.

6 Summary judgment is proper when "the pleadings, the discovery,  
7 and disclosure materials on file, and any affidavits show that  
8 there is no genuine issue as to any material fact and that the  
9 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
10 P. 56(c); Fed. R. Bankr. P. 7056 (establishing that Rule 56 applies  
11 to adversary proceedings). The moving party bears the initial  
12 burden of demonstrating the absence of a genuine issue of material  
13 fact. Once the moving party has met his burden, to avoid summary  
14 judgment the nonmovant must then present an affirmative showing of  
15 evidence to establish a genuine issue of fact. *Celotex Corp. v.*  
16 *Catrett*, 477 U.S. 317, 322-23 (1986). All justifiable inferences  
17 are to be construed in favor of the nonmovant. *Anderson v. Liberty*  
18 *Lobby*, 477 U.S. 242, 253 (1986).

19 Plaintiff's MSJ seeks a determination that there is no genuine  
20 dispute as to any material fact with respect to the First and Third  
21 Claims, each of which assert that the debt owed to Plaintiff is  
22 non-dischargeable under 11 U.S.C. § 523(a)(2)(A) and (B),  
23 respectively.

#### 25 II. The Standard for Excepting a Debt From Discharge Under 11 26 U.S.C. § 523(a)(2)

27 Section 523(a)(2) provides in pertinent part that a debtor is  
28 not discharged from a debt to the extent that debt was obtained by:

1 (A) false pretenses, a false representation, or actual  
2 fraud, other than a statement respecting the Defendant's  
or an insider's financial condition;

3 (B) use of a statement in writing-

4 (I) that is materially false;

5 (ii) respecting the debtor's or an insider's  
6 financial condition

7 (iii) on which the creditor to whom the debtor is  
liable for such money, property, services, or credit  
8 reasonably relied; and

9 (iv) that the debtor caused to be made or published  
with the intent to deceive

10 Governing law in the Ninth Circuit makes clear that to prevail  
11 on a § 523(a)(2)(A) claim a creditor must prove by a preponderance  
12 of the evidence:

13 (1) Misrepresentation, fraudulent omission or deceptive  
14 conduct by the Defendant;

15 (2) Knowledge of the falsity or deceptiveness of his  
16 statement or conduct;

17 (3) An intent to deceive;

18 (4) Justifiable reliance by the creditor on the Defendant's  
19 conduct or statement;

20 (5) Damage to the creditor proximately caused by its reliance  
21 on the Defendant's statement or conduct.

22 *Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19, 28 (B.A.P. 9th  
23 Cir. 2009), *aff'd*, 407 Fed. Appx. 176 (9th Cir. 2010).

24 The standard to prevail on a § 523(a)(2)(B) claim is largely  
25 the same, with the exception that a creditor must show the reliance  
26 on a defendant's written misrepresentation was reasonable as  
27 opposed to justifiable. *Siriani v. Northwestern Nat. Ins. (In re*  
28 *Siriani)*, 967 F.2d 302, 304 (9th Cir. 1992).



1 **III. Claim 1: Place of residence - § 523(a) (2) (A)**

2 **A. Misrepresentation of material facts and knowledge of**  
3 **falsity**

4 A statement can be materially false if it includes information  
5 which is "substantially inaccurate" and is of the type that would  
6 affect the creditor's decision-making process." *Candland v. Ins.*  
7 *Co. of N. Am. (In re Candland)*, 90 F.3d 1466, 1470 (9th Cir. 1996)  
8 (quoting *First Interstate Bank of Nev. v. Greene (In re Greene)*, 96  
9 B.R. 279, 283 (B.A.P. 9th Cir. 1989)).

10 Plaintiff's First Claim alleges that Defendant misrepresented  
11 to him that "(a) Defendant did not reside at the Subject Property  
12 but rather resided at the Kingswood Property, (b) Defendant would  
13 not occupy the Subject Property after the Loan was made, (c) the  
14 Subject Property was vacant, and (d) the Subject Property was  
15 investment property" (Doc. 8, p. 3.) when in fact she did live at  
16 the Property during the loan making process, and after the loan was  
17 made. For summary judgment purposes, the Court shall only consider  
18 the claims of Defendant's misrepresentation of where she lived  
19 during the loan application process.<sup>3</sup> The Court concludes that the  
20 undisputed facts presently available to review show Defendant  
21 misrepresented her living situation on her loan application.

22 Defendant signed documents stating that the Property was not  
23

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24 <sup>3</sup> Though there is strenuous argument by Plaintiff that the fact  
25 that Defendant having moved back to the Property two months after  
26 the loan was funded, as evidenced by Debtor's bankruptcy schedules  
27 (Doc. 11-4, Ex. 10,) establishes without dispute her intent to live  
28 at the Property after the loan was funded (and establishes that  
Defendant never moved out of the residence at all), Defendant's  
intent as to future actions involves factual questions regarding  
the Defendant's credibility that are inappropriate for disposition  
at the summary judgment stage. See *Braxton-Secret v. A.H. Robins*  
*Co.*, 769 F.2d 528 (9th Cir. 1985).

1 her residence, she did not live at the Property at the time of the  
2 loan application, that she did not plan to live there, and that the  
3 address was to be used for business purposes only. (Doc. 11-3,  
4 Plaintiff Dec. Ex. 1.) Section III of the loan application,  
5 entitled "Borrower Information," requested Defendant's "Present  
6 Address" and provided checkboxes to indicate whether a borrower  
7 owned or rented the present address, as well as space to fill in  
8 the number of years a borrower had been living at the present  
9 address. After providing a space to fill in a different mailing  
10 address, the application prompts "If residing at present address  
11 for less than two years, complete the following:" "the following"  
12 being spaces to fill in information regarding a borrower's "Former  
13 Address." (Doc. 11-3, Ex. 1.)

14 Defendant's application lists her "Present Address" as the  
15 Kingswood Address, and a checked box indicating Defendant rented  
16 the "Present Address" for two years. The space meant for a "Former  
17 Address" was left blank. (Doc. 11-3, Plaintiff Dec. Ex. 1.)  
18 Defendant also signed multiple addenda to the loan application  
19 which stated that the Property was not Defendant's primary or  
20 secondary residence, and that the loan to be obtained was for  
21 business purposes only. (Doc. 11-5.)

22 Defendant concedes that the Property was her principal  
23 residence until sometime shortly before the loan was funded, and  
24 that she moved back to the Property about two months after the loan  
25 closed, after an attempted sale fell apart. (Doc. 32, p. 7.)  
26 However, Defendant contends that her statements within her loan  
27 applications were not misrepresentations, because the loan broker,  
28 Roesner, knew at the time of making the loan application that those

1 statements were false, and in fact directed Defendant to make the  
2 false statements. Defendant also contends that she did not make  
3 false statements because she did not complete the loan application  
4 herself but was instead presented a "pre-filled" loan application  
5 by Roesner for her signature. (Doc. 32 p. 2, Doc. 33 p. 4.)

6 Defendant also points to an email exchange between herself and  
7 Roesner as evidence that she could not have misrepresented her  
8 living situation, when Plaintiff knew of her living situation  
9 throughout the loan application process. During this exchange,  
10 Roesner told Defendant that Plaintiff<sup>4</sup> needed her to write a letter  
11 stating her intent to move out of the Property. Defendant agreed  
12 and told Roesner she would write a letter stating intent to move  
13 out of the Property until the loan closed. (Doc. 11-3, Ex. 7.)  
14 Seemingly as a result of this exchange, Defendant signed a letter  
15 dated March 2015, which appears to have been marked by hand to read  
16 "March 2016." The letter stated that the Property was Defendant's

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18 <sup>4</sup> Defendant further contends that Roesner was Plaintiff's agent,  
19 and concludes without further argument or citation that under Cal.  
20 Civ. Code § 2332, such an agency relationship compels the  
21 conclusion that all knowledge of Defendant's false statements (and  
22 Roesner's instructions to Defendant to make such statements in the  
23 first place), can be imputed to Plaintiff. (Doc. 32, p. 13.)  
24 However, beyond making a few perfunctory statements concerning the  
25 possibility that Roesner might have been Plaintiff's agent (based,  
26 in turn, upon a spoliation of evidence argument that is neither at  
27 this point sufficiently developed, nor obviously germane to the  
28 questions presented here) and having assumed the legal conclusion  
she would like the Court to endorse, Defendant has made no showing  
that an agency relationship existed between Roesner and Plaintiff.  
Nor did Defendant establish that such an agency relationship means  
any knowledge Roesner had about Defendant's living situation must  
be imputed to Plaintiff. The Court further notes that Plaintiff  
also alleged during the February 20 hearing that Roesner was in  
fact Defendant's agent without making any sort of evidentiary  
showing. The Court declines to find an agency relationship between  
Roesner and either party for the reasons stated above.

1 "home" and that she would be moving to live with her mother until  
2 the Property sold. (Doc. 11-3, Ex. 8.) Plaintiff admits that he  
3 received the letter prior to making the loan, stating in his  
4 Declaration that

5  
6 Longmire provided me with the letter dated March  
7 8, 2015, which Roesner represented to me was  
8 signed a full year earlier in connection with  
9 Longmire's attempt to obtain another loan, and  
10 that Longmire had long since moved out of the  
11 Subject Property. Roesner assured me that  
12 Longmire did not, and would not, reside at the  
13 Subject Property and, consistent with the letter,  
14 told me that Longmire lived with her elderly  
15 mother at the Kingswood Property (Doc. 11-3, p.  
16 7.)

17 Defendant contends that dating of the letter was not an  
18 attempt to mislead but a typographical error which she later  
19 corrected when brought to her attention by Plaintiff. (Doc 33, p.  
20 5.)

21 It appears to the Court at present that there is no genuine  
22 dispute that on her loan application, Defendant knowingly  
23 misrepresented that the Property was not her residence during the  
24 loan application process. Whether or not these statements were  
25 made at the behest of Plaintiff or Roesner, there is no dispute  
26 that Defendant knew the statements were false.

27 **B. Intent to deceive**

28 While there does not appear to be a genuine dispute that  
Defendant knowingly made false statements regarding her residence  
to obtain a loan on the Property, genuine issues of fact arise  
regarding Defendant's intent to deceive Plaintiff by making such  
representations. "Intent is usually proven by circumstantial

1 evidence or by inferences drawn from the debtor's conduct.  
2 Reckless indifference or disregard for the truth may be  
3 circumstantial evidence of intent, but is not sufficient, alone, to  
4 constitute fraudulent intent." *In re Retz*, 606 F.3d 1189, 1199  
5 (9th Cir. 2010) (citations omitted).

6 The evidence presented by both Plaintiff and Defendant show  
7 that in an email exchange between Defendant and Roesner prior to  
8 the closing of the loan, Defendant believed that she was under the  
9 instruction of both Plaintiff and Roesner to misrepresent her  
10 living situation on the loan application. (Doc. 11-4, Exs. 6-7,  
11 Doc. 33-2, Exs. H-1, H-2.) While knowingly misrepresenting her  
12 living situation could be inferred as reckless indifference for  
13 truth, the Court does not find such an inference at present.  
14 Defendant states unequivocally that she believed that Roesner and  
15 Plaintiff were each aware that she had lived at the Property, and  
16 that the "story" to the contrary on which Plaintiff was insisting  
17 was a sham; and with at least some evidentiary support for  
18 Defendant's belief that Plaintiff was in on the "story" that the  
19 Property had not been, was not, and would not be Defendant's  
20 residence, and that she was lying essentially at the behest of  
21 Plaintiff.

22 The Court cannot find as a matter of undisputed fact that  
23 Defendant intended to deceive Plaintiff. What is at issue for the  
24 Court is not whether Plaintiff actually directed Defendant to  
25 misrepresent her living situation, it is whether there is a genuine  
26 dispute as to Defendant's intent to deceive Plaintiff. The Court  
27 finds such a dispute that will need to be resolved at some later  
28 date.

1           **C.     Justifiable Reliance**

2           The Supreme Court has established that the standard for  
3     excepting a debt from discharge under § 523(a)(2)(A) is actual,  
4     justifiable reliance as opposed to the more stringent standard of  
5     reasonable reliance. *Field v. Mans*, 516 U.S. 59 (1995). "In  
6     considering whether reliance is justifiable, the court must take  
7     into account the knowledge and relationship of the parties."  
8     *Romesh Japra, M.D., F.A.C.C. v. Apte (In re Apte)*, 180 B.R. 223,  
9     230 (B.A.P. 9th Cir. 1995) (citations omitted). While there is no  
10    independent duty to investigate a defendant's claims under a  
11    justifiable reliance standard, a person cannot ignore obvious red  
12    flags or "close his eyes to avoid discovery of the truth." *Id.* at  
13    229.

14          Debtor did not dispute Plaintiff's contention that he actually  
15    relied on Plaintiff's representations regarding her residence.  
16    Plaintiff still fails to meet his burden on this element and  
17    appears to have ignored multiple "red flags" in the form of the  
18    loan application and accompanying documents squarely in front of  
19    Plaintiff prior to making the loan.

20          Plaintiff's Amended Complaint and Motion for Summary Judgment  
21    both stress that Plaintiff is an experienced hard money lender that  
22    does not make loans secured by a borrower's residence, for a  
23    variety of plausible reasons. Plaintiff makes clear he had been  
24    making hard money loans for many years and had made clear to  
25    brokers his unwillingness to make loans secured by a borrower's  
26    residence since at least 2010. (Doc. 11-3, p. 3.)

27          There is no dispute that there was no relationship between the  
28    parties prior to Defendant making the loan application, and that

1 the parties did not meet or communicate directly during the course  
2 of the loan application process. Plaintiff states that he relied  
3 on Plaintiff's loan application including all addenda, the letter  
4 regarding Debtor's intent to move, and Roesner's assurances  
5 regarding Debtor's residence when making the loan to Defendant.  
6 The face of the loan application, signed and dated March 12, 2016,  
7 stated Defendant had been living at the Kingswood Address for 2  
8 years, and that she lived rent free. (Doc. 11-3, Ex. 1.) As part  
9 of the loan application Defendant signed multiple addenda stating  
10 that the Property was not Defendant's primary or secondary  
11 residence, and that the loan was for business purposes only.

12 However, the letter Plaintiff received from Defendant prior to  
13 the loan application being signed and submitted to him casts the  
14 statements on the loan application in a troublingly ambiguous  
15 shadow. As discussed above, the letter states plainly that  
16 Defendant considered the Property her "home" and that she was only  
17 moving out of the home to stay with money in the "interim" while  
18 she attempted to sell her home.

19 While Plaintiff claims that he was informed by Roesner that  
20 this letter was written for a prior lender in 2015 and that  
21 Defendant had "long since moved out of the Subject Property" (Doc.  
22 11-3, p. 7.), it is unclear from the face of the document whether  
23 the letter to Plaintiff was dated March 8, 2015 or March 8, 2016.  
24 The Court need not weigh facts concerning the date of the letter,  
25 because whether the letter was written in 2015 or 2016, it is clear  
26 from that document that Defendant lived in the Property and  
27 considered the Property to be her home less than two years prior to  
28 signing the loan application. The statements of the letter, given

1 to Plaintiff days before the loan closing, directly contradict the  
2 application's statements that Defendant had not lived at the  
3 Property for at least two years prior to the loan application and  
4 that Defendant considered the Property to be a business/investment  
5 property as opposed to her residence.

6 Such disparate statements were squarely in front of Plaintiff  
7 at the time he made the loan. Plaintiff has failed to establish a  
8 lack of genuine dispute surrounding the justifiability of his  
9 reliance on statements regarding Defendant's residence when making  
10 the loan.

11  
12 **IV. Claim 3: Financial Position - § 523(a) (2) (B)**

13 **A. Written misrepresentation of material facts and knowledge**  
14 **of falsity**

15 Plaintiff claims Defendant misrepresented her income to him by  
16 listing her monthly base income as \$21,375 per month on the loan  
17 application. Since the parties do not dispute the income amount  
18 listed on the submitted loan application, the focus for the Court  
19 is whether there is a genuine dispute that amount was a  
20 misrepresentation by the Defendant.

21 Generally, a statement is respecting the debtor's financial  
22 condition "if it has a direct relation to or impact on the debtor's  
23 overall financial status." *Lamar, Archer & Cofrin, LLP v. Appling*,  
24 138 S. Ct. 1752, 1762 (2018). A loan application containing  
25 information about an applicant's income constitutes a statement in  
26 writing respecting the applicant's financial condition for purposes  
27 of § 523(a) (2) (B). See *Cashco Fin. Servs. v. McGee (In re McGee)*,  
28 359 B.R. 764, 768 (B.A.P 9th Cir. 2006). Here, Defendant's written



1 statement was a signed loan application stating base monthly income  
2 of \$21,375 per month which qualifies as a written statement. (Doc.  
3 11-3, Ex. 1.)

4 "'Material falsity' in a financial statement can be premised  
5 upon the inclusion of false information or upon the omission of  
6 information about a debtor's financial condition." *First*  
7 *Interstate Bank of Nev. v. Greene (In re Greene)*, 96 B.R. 279, 283  
8 (B.A.P. 9th Cir. 1989) (citing *In re Anzman*, 73 B.R. 156, 163  
9 (Bankr. D. Colo. 1986). The Court concludes that the undisputed  
10 facts show Defendant knowingly misrepresented her income on her  
11 loan application.

12 Defendant claims that she did not fill out the loan  
13 application, but that it was completed by someone else and provided  
14 for her to sign. However, Defendant does concede that she did  
15 review the information on the loan application before signing and  
16 submitting it to the Plaintiff. On the loan application, the self-  
17 employed box was checked, and her monthly base income was listed as  
18 \$21,375 with no further explanation. In support of her financial  
19 condition, the Defendant submitted her tax returns for 2013 and  
20 2014, a letter listing her business projections, and bank  
21 statements. Although Defendant claims that the \$21,375 per month  
22 income statement was a reasonable estimate, these documents show  
23 that it was a substantially inaccurate estimate. First, the 2013  
24 tax return shows income of \$212,000, or an average of \$17,711.50  
25 per month, and it includes a \$135,000 "settlement", making it clear  
26 that such income was probably not in the ordinary course. (Doc.  
27 33-2, Ex. L-1.) Second, while the 2014 tax return did show an  
28 average monthly income of \$22,050, Defendant's 2015 and 2016 tax

1 returns revealed average monthly incomes of less than \$15,000 per  
2 month and less than \$3,500 per month, respectively. (Doc. 33, Ex.  
3 L-2; Doc. 11-5, Ex. 11; Doc. 11-4, Ex. 10.)

4 As the purpose of the Plaintiff's request for Defendant's  
5 monthly income was to determine her eligibility for repaying the  
6 requested loan, based on the undisputed facts it is clear that the  
7 \$21,375 figure listed was a material misrepresentation of the  
8 Defendant's monthly base income.

9 Defendant contends that even if the statement was false, she  
10 didn't know it to be false because as a self-employed person she  
11 didn't know the exact amount of income she would receive every  
12 month and the amount listed on the application was a reasonable  
13 estimate. Defendant points to her success in sports marketing as  
14 support. Defendant's financial history does provide some support  
15 for this argument (Defendant's average monthly income increased  
16 from less than \$18,000 in 2013 to \$22,050 in 2014). However, three  
17 days prior to the closing of the loan the Defendant emailed her  
18 accountant to report income of \$224,000 (about \$18,667 per month)  
19 for 2015. (Doc. 42-2, p. 5.)

20 Examining the more recent pre-loan financial information  
21 doesn't lend any more support to Defendant's position. Prior to  
22 the closing of the loan, the Defendant provided a letter listing  
23 her projected business revenue sources. (Doc. 33-2, Ex. M-1.) The  
24 letter consisted of a list of six transactions totaling \$64,000 in  
25 income, only \$10,500 of which came from monthly retainers. *Id.*  
26 The letter also listed four other "Commission pending" transactions  
27 and four "Pending future contract" accounts both without an  
28 associated monetary value. *Id.* While the list did show that the

1 Defendant expected to have future income, it merely speculated as  
2 to how much it would be and when it would be received. It did not  
3 support the statement that Defendant would make \$21,375 per month,  
4 regularly, or on average.<sup>5</sup>

5  
6 **B. Made With Intent to Deceive**

7 If the monthly base income entered on the loan application was  
8 a false, material statement, and Defendant knew it to be false, it  
9 follows that the statement was made with the intent to deceive the  
10 Plaintiff and increase the likelihood of securing the loan.

11 Considering the facts under the reckless disregard analysis  
12 discussed above in Section III.B, we can also find that the intent  
13 to deceive was satisfied. Defendant's tax returns leading up to  
14 the loan from Plaintiff demonstrate an inconsistent income stream.  
15 As discussed above, Defendant's tax returns show her annual income  
16 fluctuating from \$212,538 in 2013 to \$264,600 in 2014, before

17 \_\_\_\_\_  
18 <sup>5</sup>At the hearing on February 20th, 2019, Defendant's counsel  
19 clarified that he didn't think there was a single month in  
20 Defendant's entire life that she made exactly \$21,375. Defendant  
21 provided a loan application to Plaintiff with a projected base  
22 monthly income of \$21,375 which, without further explanation,  
23 implies that she did in fact make \$21,375 per month. Without a  
24 history demonstrating that she had ever made exactly \$21,375 or  
25 that she had consistently made at least that much, it is factually  
26 undisputed that Defendant knew \$21,375 was not her actual base  
27 monthly income, even though she may have believed it was within a  
28 range of blue-sky possibilities.

1 trending back down to \$174,899 in 2015. Defendant's email  
2 disclosing her estimated 2015 income to her accountant, discussed  
3 above, demonstrated that Defendant was aware prior to the loan that  
4 her income the previous year was well below an average of \$21,375  
5 per month, despite not yet having filed her 2015 tax return.

6 Defendant's monthly bank statements leading up to the loan  
7 were also inconsistent. At the hearing on February 20th, 2019,  
8 Defendant referenced her bank statements from December of 2015 and  
9 January of 2016 in support of the base monthly income figure, where  
10 she made \$16,000 and \$33,000, respectively, from her sports  
11 marketing business.

12 The letter Defendant provided prior to the commencement of the  
13 loan, which listed her projected business revenue sources, lacked  
14 certainty. (Doc. 33-2, Ex. M-1.) The letter listed fourteen  
15 projected accounts but was very brief with detail and appeared to  
16 be based in speculation. For example, monetary values were only  
17 attributed to six of the accounts and dates of payment were only  
18 attributed to three of them.

19 These facts lend support to Defendant's argument that self-  
20 employment is subject to great fluctuations in monthly income. But  
21 more importantly, these facts and documents highlight the necessity  
22 of providing further clarification to the lender about the  
23 speculative nature of the \$21,375 base monthly income listed on the  
24 loan application. As a sole proprietor and as someone who had been  
25 through the hard money loan process before, Defendant had the  
26 business sophistication to understand that the base monthly income  
27 listed on the loan application would affect Plaintiff's decision-  
28 making process. In neglecting to clarify that her monthly income

1 was volatile and could jump from \$16,000 in one month to \$33,000  
2 the next, or that her annual income from the immediately preceding  
3 year had dropped almost \$90,000 from the prior year, Defendant  
4 demonstrated a reckless indifference to her actual financial  
5 circumstances. Therefore, the undisputed material facts currently  
6 before the Court support a finding that the Defendant listed an  
7 elevated, false income on her application with the intent to  
8 deceive the Plaintiff.

9  
10 **C. Reasonable Reliance**

11 Before addressing the question of reasonable reliance on  
12 Defendant's statement concerning her income, the Court finds a  
13 genuine dispute regarding whether Plaintiff actually relied on that  
14 statement.

15 Plaintiff asserts that the monthly base income listed on the  
16 loan application was a factor that he relied on in his decision to  
17 extend financing to Defendant. However, Defendant has raised the  
18 possibility (or in her view, the likelihood) that alternative  
19 factors, such as the high interest rate on the loan and the value  
20 of the house, were the factors on which Plaintiff more likely  
21 relied. At the hearing, Plaintiff was not able to refute the  
22 Defendant's challenge by pointing to a formula or methodology  
23 utilized to determine the sufficiency of \$21,375 per month base  
24 monthly income, or any other value. Therefore, based upon the  
25 facts before the Court, there does appear to be a genuine dispute  
26 as to whether Plaintiff actually relied on the income amount listed  
27 on the loan application.

1 Even assuming there was actual reliance on the income listed  
2 on the loan application, that reliance must be reasonable. Unlike  
3 § 523(a)(2)(A), § 523(a)(2)(B) explicitly requires reliance to be  
4 based on a "reasonable" standard, which entails an objective,  
5 "prudent person" test. See *Field v. Mans*, 516 U.S. at 69-71, 77.  
6 "Reasonable reliance is a term courts can apply without additional  
7 help" and "is judged in light of the totality of the circumstances  
8 on a case-by-case basis." *In re Candland*, 90 F.3d at 1471; *In re*  
9 *McGee*, 359 B.R. at 774 (citing 4 *Collier on Bankruptcy* ¶  
10 523.08[2][d], at 523-49 (Alan N. Resnick & Henry J. Sommer, eds.,  
11 15th ed. rev. 2006)). To rely solely on one statement about the  
12 Defendant's income within a financial statement that attempts to  
13 demonstrate Defendant's true financial position by setting forth  
14 information concerning both income and liabilities, without further  
15 investigation, may support a finding of unreasonable reliance. See  
16 *Abrams v. Sea Palms Assocs., Ltd. (In re Abrams)*, 229 B.R. 784, 789  
17 (B.A.P. 9th Cir. 1999).

18 The facts before the Court give rise to genuine dispute as to  
19 whether the Plaintiff's reliance on the financial statement was  
20 reasonable.

21 The base monthly income, when considered with the liabilities  
22 disclosed on the very same loan application, hardly demonstrates  
23 Defendant's ability to make the monthly loan payments. To the  
24 contrary, fairly read, by any lender with even a modicum of  
25 financial sense, the financial statement makes clear that Defendant  
26 would be unable to make the loan payments.

27 Under the "Liabilities" section of the loan application,  
28 Defendant lists two loans with the Department of Education/Navient

1 and two loans with VW Credit. (Doc. 11-3, Ex. 1.) Although it  
2 might indicate that error was made in filling out this section, in  
3 that the second loan from the Department of Education/Navient and  
4 two loans from VW Credit have the "Unpaid Balance" listed in the  
5 "Monthly Payment & Months Left to Pay" column and vice versa, it  
6 can nonetheless be deduced from these entries that Defendant had  
7 monthly loan payment obligations of more than \$7,000 per month.  
8 These monthly liabilities alone, when added to the \$16,804.17  
9 monthly loan payment under Plaintiff's loan, themselves exceed the  
10 base monthly income of \$21,375 (which also appears to be on a pre-  
11 tax basis), even without allowing for reasonable living expenses.

12 As stated previously, Plaintiff has not provided any  
13 information concerning what formula or methodology he employed to  
14 determine what would constitute a "sufficient" monthly income  
15 timely to service this loan. But surely it must have at the very  
16 least exceeded the applicant's obligations under this loan and  
17 other pending loan obligations. Based on the facts in front of the  
18 Court, without explanation of methodology, it would appear any  
19 reliance on the Defendant's financial statement was unreasonable.

20 Although the undisputed facts before the Court support a  
21 finding that Defendant intentionally misrepresented her financial  
22 condition to Plaintiff to deceive him, those facts do not  
23 demonstrate that Plaintiff actually relied, let alone reasonably  
24 relied, on that misrepresentation entitling Plaintiff to summary  
25 judgment. Since all elements of § 523(a)(2)(B) must be met and for  
26 the reasons stated above, the Court denies the Plaintiff's motion  
27 for summary judgment on the Third Claim.

28

1 **V. Cross Motion for Summary Judgment**

2 Defendant's Cross-Motion seeks summary judgment on Plaintiff's  
3 First, Second, Third and Fourth Claims.

4 As the Court indicated at the conclusion of the argument on  
5 these matters, the Court is granting the Defendant's Motion to  
6 Dismiss against the Fourth Claim, without leave to amend. That  
7 disposition will be reflected in an Order Granting in Part and  
8 Denying in Part Defendant's Motion to Dismiss, to be entered  
9 concurrently herewith. The Cross-Motion is thus denied as moot as  
10 to the Fourth Claim.

11 With respect to the remaining claims that are subject to the  
12 Defendant's Cross-Motion, the Court notes that Plaintiff's Motion  
13 for Summary Judgment seeks relief with respect to the First (false  
14 statement concerning residence) and Third (false statement  
15 concerning income) Claims, but not with respect to the Second  
16 (false statement with respect to real property security). Thus,  
17 while the Court's ruling on the First and Third Claims in  
18 connection with the Plaintiff's Motion is potentially instructive  
19 with respect to the assertions made in the Defendant's Cross-  
20 Motion, the Court will address the Defendant's assertions regarding  
21 the Second Claim separately.

22 Having noted that distinction, however, the Court notes that  
23 the Cross-Motion makes essentially the same argument with respect  
24 to the First, Second and Third Claims: that the Plaintiff will not  
25 be able to "prove" that any statements Defendant made were false,  
26 and therefore summary judgment in favor of Defendant is  
27 appropriate.

28



1 Defendant may be correct that, ultimately, Plaintiff will not  
2 be able to prevail at trial, but the Court is not asking Plaintiff  
3 to prove up each element of his Claims. Rather, Defendant's Cross-  
4 Motion must persuade the Court that Plaintiff has failed to  
5 establish the existence any element essential to those claims,  
6 including the element of misrepresentation. See *Celotex Corp. v.*  
7 *Catrett*, 477 U.S. at 322.

8 In addition, Defendant's assertions that none of her  
9 statements concerning her residence at the Property, or her income,  
10 or the value of the Property, were "false" are unavailing, for two  
11 reasons.

12 First, as explained in detail previously herein in connection  
13 with the disposition of Plaintiff's Motion, in the best of all  
14 worlds, Defendant's arguments for why her statements about her  
15 residency and her income are not false require the Court to accept  
16 and find credible her characterizations and contextualization of  
17 her statements--an outcome that, while not outside the realm of  
18 possibility, is hardly ordained, and would seem, at best, to  
19 require the sort of sifting and weighing and assessment of  
20 credibility that might be appropriate at trial, but is impossible  
21 at summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. at  
22 249 ("[A]t the summary judgment stage the judge's function is not  
23 himself to weigh the evidence and determine the truth of the matter  
24 but to determine whether there is a genuine issue for trial.").  
25 Stated slightly differently, this sort of "Guilty, but with an  
26 explanation" rationale is uniquely unsuited for a determination  
27 that Plaintiff will, as a matter of law, never be able to prove an  
28 essential element of his claims.

1       Second, while, for the reasons stated above at p. 2 the Court  
2 is not currently making any permanent findings of fact with respect  
3 to the Plaintiff's MSJ, it certainly appears to the Court that at  
4 this stage of the "proof", at least some of the statements made by  
5 Defendant with respect to the First Claim (i.e., that Defendant had  
6 not resided at the Property for the two years prior to the loan  
7 transaction, but had "rented" at her mother's house) and the Third  
8 Claim (i.e., that her monthly income was \$21,375 without any sort  
9 of explanation of qualification) are actually what we would  
10 commonly call "false."

11       Considering these points, it is very difficult to see any  
12 merit in Defendant's Cross-Motion on the First or Third Claims.

13       And Defendant's Cross-Motion fares no better with respect to  
14 the Second Claim. As noted previously, Plaintiff is not moving for  
15 summary judgment with respect to this claim, which asserts that  
16 Defendant falsely reported the value of the Property, which was the  
17 security for the loan, in connection with the loan application.  
18 Defendant's assertions about the Property and its value, i.e. that  
19 Defendant did not make a false statement by saying that the  
20 Property was worth \$2,500,000, in light of a somewhat recent  
21 appraisal and in light of the fact that, on some level, a statement  
22 about the worth of real property is usually more "opinion" than  
23 "fact," may ultimately prove to have merit. However, those  
24 assertions hardly foreclose the matter in the manner necessary to  
25 enter summary judgment in her favor. While statements of valuation  
26 are generally considered statements of opinion which do not support  
27 a fraud claim, "[r]epresentations of value which the declarant does  
28 not, in fact, hold or declarations made with reckless indifference

1 for the truth may be found to be fraudulent." *Loomas v. Evans (In*  
2 *re Evans)*, 181 B.R. 508, 512 (Bankr. S.D. Cal) (quoting *Chase*  
3 *Manhattan Bank v. Fordyce*, 56 B.R. 102, 105 (Bankr. M.D. Fla.  
4 1985)).

5 And as mentioned in Defendant's Cross-Motion, Defendant,  
6 because she does not have the burden of persuasion at trial, may  
7 prevail on a summary judgment motion if she carries her burden of  
8 production by showing "that the nonmoving party does not have  
9 enough evidence of an essential element to carry its ultimate  
10 burden of persuasion at trial. . . . If a moving party fails to  
11 carry its initial burden of production, the nonmoving party has no  
12 obligation to produce anything." *Nissan Fire & Marine Ins. v.*  
13 *Fritz Co.* 210 F.3d 1099, 1102-03 (9th Cir. 2000).

14 However, Defendant's Cross-Motion fails to meet its burden of  
15 production because it merely asserts, without any further argument,  
16 reasoning, or citation, that Plaintiff is unable to prove that the  
17 valuation is false. Such a bare assertion does not establish the  
18 absence of dispute regarding whether the appraisal from May 2015  
19 reflected what Defendant knew about the Property's value in 2016.  
20 Plaintiff produced no evidence in response to this assertion, nor  
21 did Plaintiff have to. At this relatively early stage of  
22 litigation, with essentially no facts determined for any purpose as  
23 to Plaintiff's Second Claim, it would be thoroughly improper to  
24 terminate this aspect of the action via summary judgment on the  
25 bare assertion that Plaintiff will be unable to meet his burden  
26 concerning valuation of the Property.

27 For all of these reasons, the Defendant's Cross-Motion is  
28 denied with respect to the First, Second and Third Claims.

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